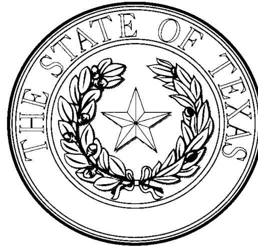
**Opinion issued September 9, 2021**




**In The**

**Court of Appeals**

**For The**

**First District of Texas**

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**NO. 01-21-00128-CV**

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**IN RE MARK CANFORA, LANCE KASSAB, AND DAVID KASSAB, Relators**

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**Original Proceeding on Petition for Writ of Mandamus**

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## MEMORANDUM OPINION

Relators Mark Canfora, Lance Kassab, and David Kassab filed a petition for writ of mandamus alleging respondent, the Honorable Lauren Reeder, abused her discretion when she denied their Rule 91a motion to dismiss, which Relators

advanced based on the affirmative defenses of attorney immunity and judicial proceedings privilege. We conditionally grant the petition.[1]

## Background

The underlying litigation involves a professional negligence action. Mark Canfora ("Canfora") and Mark Canfora Investments, LLC ("MCI") hired real party in interest Brent W. Coon, PC d/b/a Brent Coon & Associates ("BCA")[2,3] and others to represent them against BP in claims stemming from the 2010 Deepwater Horizon oil spill.[4] During the representation, Canfora and MCI entered into a settlement agreement with BCA under which BCA waived $105,000 in attorney fees in exchange for Canfora's and MCI's release of BCA and others from any claims in connection with the representation.

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1 The underlying case is *Mark Canfora and Mark Canfora Investments, LLC v. Brent W. Coon, PC d/b/a Brent Coon & Associates, Brent W. Coon, Eric Newell, John R. Thomas, Lori J. Slocum, Robert A. Schwartz, Mary Cathryne Caraway Jacob, and Darren A. Miller*, Cause No. 2020-46985, pending in the 234th District Court of Harris County, Texas, the Honorable Lauren Reeder presiding.

2 References to BCA herein include the law firm and its individually named attorneys.

3 Only one of the real parties in interest, Mary Cathryne Caraway Jacob, is not an attorney for BCA now; she now practices in Georgetown, Texas. Presumably, she worked for BCA at the time in question. In its counterclaim and third-party claim, BCA asserts the named defendants were "mere employees of BCA . . . holding no financial interest in BCA as a partner."

4 The Deepwater Horizon oil spill was caused by an explosion on the Deepwater Horizon oil rig in the Gulf of Mexico. Richard Pallardy, *Deepwater Horizon oil spill*, ENCYCLOPEDIA BRITANNICA (April 13, 2021), https://www.britannica.com/event/Deepwater-Horizon-oil-spill. It is the largest marine oil spill in history. *Id.*

Subsequently, Canfora and MCI hired Lance Christopher Kassab and David Eric Kassab (collectively, the "Kassabs") to represent them in a legal malpractice suit against BCA and others stemming from their representation of Canfora and MCI in the BP litigation. In their First Amended Petition, Canfora and MCI allege, among other things, that BCA was negligent and grossly negligent by failing to follow court orders, failing to follow appellate deadlines, and failing to communicate and comply with reasonable client requests. Canfora and MCI also allege BCA and others violated their fiduciary duty in several ways, including by requiring them to pay litigation expenses for the BP litigation that BCA and others were obligated to pay contractually, engaging in unwaivable conflicts of interest by accumulating and maintaining a massive BP docket, placing other clients' interests ahead of those of Canfora and MCI, convincing Canfora and MCI to enter into an unfair and unreasonable settlement agreement without making adequate disclosures, and keeping thousands of dollars in filing fees they requested for separate filings, only to file the lawsuits jointly.[5]

BCA filed an answer and counterclaimed against Canfora for defamation. BCA also asserted third-party claims against the Kassabs and their law firm for defamation and tortious interference with contract. BCA's defamation claims

[5] James Glick, Russell Lengacher, Luke Martin, and Nelson Mast are also plaintiffs in the underlying lawsuit. They are not involved in the present mandamus proceeding.

against Canfora and the Kassabs stem from language in Canfora's and MCI's First Amended Petition that:

> [BCA] filed a single complaint [in the BP litigation] on behalf of Plaintiffs and numerous other individuals or entities . . . . who suffered economic losses as a result of the oil spill . . . [BCA] filed a second single "Complaint" on behalf of MCI and two of Canfora's other entities . . . . Even though BCA received $8,800 in filing fees from these 22 clients to file their cases individually, [BCA] still filed joint complaints and paid only two $400 filing fees, and BCA apparently pocketed the other $8,000 in illegal and unethical fees that they received. This was yet another breach of fiduciary duty, and again, one that was likely inflicted on thousands of unwitting BCA clients.

(Footnotes omitted). A footnote in the First Amended Petition also states:

> BCA touts that it had over 10,000 clients involved in the lawsuits against BP. Thus, for every 1000 clients who Defendants forced to pay the $400.00 in violation of their contractual obligations, Defendants pocketed $400,000.

BCA seeks damages of more than $1,000,000 in connection with its defamation claim.

BCA also alleges Canfora breached the settlement agreement that released BCA and others from liability for any potential malpractice in exchange for their waiver of $105,000 in fees.[6] According to BCA, the agreement "incorporated all the claims alleged by Canfora and the Canfora entities in this proceeding."[7] BCA

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[6] BCA seeks $105,000 in fees through forfeiture for contract damages. The breach of contract claim against Canfora is not relevant to this proceeding.

[7] During the hearing on the Rule 91a motion, BCA's counsel said some of the BP claims had been resolved in the settlement agreement and the others were dismissed.

further alleges the Kassabs were aware of the settlement agreement and tortiously interfered with it by filing the underlying malpractice action on behalf of Canfora and MCI. BCA alleges the Kassabs filed the litigation to bring bad publicity to BCA, which had prevailed in prior cases against the Kassabs. BCA seeks damages of more than $1,000,000 for its tortious interference claim.

Canfora and the Kassabs pleaded the affirmative defenses of attorney immunity and judicial proceedings privilege in response to the defamation and tortious interference claims. They then moved to dismiss the defamation and tortious interference claims under Texas Rule of Civil Procedure 91a based on their affirmative defenses. The trial court held a hearing on the Rule 91a motion on November 16, 2020.[8] On January 12, 2021, the trial court signed an order denying the Rule 91a motion to dismiss.[9]

Canfora and the Kassabs assert that mandamus relief is warranted because Respondent abused her discretion in denying their Rule 91a motion. They assert (1) they should not have to waste time and money defending against the defamation and tortious interference claims, which are "clearly barred," and (2)

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[8] In addition to Canfora and the Kassabs' Rule 91a motion, the trial court also heard arguments on two pending motions for sanctions filed by the parties pursuant to Texas Rule of Civil Procedure 13. The Honorable Latosha Lewis Payne, who was covering Respondent's hearing docket that day, presided over the hearing but did not issue a ruling.

[9] BCA also filed a Rule 91a motion, but that motion is not part of this mandamus proceeding.

without mandamus relief, the Kassabs will have to defend themselves for statements made and actions taken in connection with their representation of Canfora and MCI. Relators claim Canfora and MCI will have to retain new counsel or risk confusing the jury by the Kassabs' roles as both advocates and parties to the same lawsuit.

BCA contends the judicial proceedings privilege and attorney immunity defense do not bar their claims for defamation and tortious interference because the statements and actions at issue do not have "some relation to the proceedings."

**Applicable Law**

A party may move for dismissal under Rule 91a when a cause of action has no basis in law. *In re Farmers Tex. County Mut. Ins. Co.*, No. 19-0701, 621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding). Texas Rule of Civil Procedure 91a, entitled "Dismissal of Baseless Causes of Action," states in pertinent part:

> **91a.1 Motion and Grounds.** Except in a case brought under the Family Code or a case governed by Chapter 14 of the Texas Civil Practice and Remedies Code, a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded.
>
> . . .
>
> **91a.6 Hearing; No Evidence Considered.** Each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. The court may, but is not required to, conduct an oral hearing on the

> motion. Except as required by 91a.7, the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.

TEX. R. CIV. P. 91a. Rule 91a motions may be based on affirmative defenses if they are established conclusively by the facts in the plaintiff's petition. *See Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020).

## Standard of Review

A trial court's order denying a Rule 91a motion to dismiss is reviewable by mandamus. *In re Essex Ins. Co.*, 450 S.W.3d 524, 526 (Tex. 2014); *see also In re Butt*, 495 S.W.3d 455, 460 (Tex. App.—Corpus Christi 2016, orig. proceeding) ("[M]andamus review of orders denying Rule 91a motions comports with the Legislature's requirement for an early and speedy resolution of baseless claims."). To obtain mandamus relief from Respondent's denial of their Rule 91a motion to dismiss, Canfora and the Kassabs must establish (1) the trial court abused its discretion by denying their Rule 91a motion to dismiss, and (2) they have no adequate remedy by appeal. *In re Essex*, 450 S.W.3d at 526.

To prove the trial court abused its discretion, Canfora and the Kassabs must establish Respondent "reache[d] a decision so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law" or that she "clearly fail[ed] to correctly analyze or apply the law." *In re Butt*, 495 S.W.3d at 459-60 (citing *In re*

*Olshan Found. Repair Co.,* 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding)). As to the second requirement, the Texas Supreme Court has held "mandamus relief is appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings." *In re Essex*, 450 S.W.3d at 528.

**Discussion**

The only claims at issue in this proceeding are BCA's counterclaim against Canfora for defamation and third-party claims against the Kassabs for defamation and tortious interference with contract.

To prevail on a defamation case, a plaintiff must prove:

> (1) publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) that proximately caused damages.

*Anderson v. Durant*, 550 S.W.3d 605, 617–18 (Tex. 2018) (quoting *Bos v. Smith*, 556 S.W.3d 293, 307 (Tex. 2018)). As explained above, BCA's defamation claims stem from statements in Canfora's First Amended Petition that BCA allegedly "pocketed" filing fees collected from Canfora, MRI and other clients in the BP litigation.

The elements of a claim for tortious interference with contract are

> (1) an existing contract subject to interference, (2) a willful and intentional act of interference with the contract, (3) that proximately caused the plaintiff's injury, and (4) caused actual damages or loss.

*Prudential Ins. Co. of Am. v. Fin. Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000). The tortious interference claim is based on allegations that the Kassabs filed suit against BCA on behalf of Canfora and MCI even though BCA and Canfora had entered into a settlement agreement that "incorporated all the claims alleged by Canfora and the Canfora entities in this proceeding."

**Attorney Immunity: Claims Against the Kassabs**

Attorneys generally have immunity from civil liability to non-clients "for actions taken in connection with representing a client in litigation." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015) (citing *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398, 405 (Tex. App.—Houston [1st Dist.] 2005, pet. denied)). Attorney immunity "is a comprehensive affirmative defense protecting attorneys from liability to non-clients." *Id.* The defense provides that an attorney "may only be liable to nonclients for conduct outside the scope of his representation of his client or for conduct foreign to the duties of a lawyer." *McDill v. McDill*, No. 03-19-00162-CV, 2020 WL 4726634, at *8 (Tex. App.—Austin July 30, 2020, pet. denied) (mem. op.) (citation omitted).

The attorney immunity defense "is intended to ensure 'loyal, faithful, and aggressive representation by attorneys employed as advocates.'" *Cantey Hanger*, 467 S.W.3d at 481 (quoting *Mitchell v. Chapman,* 10 S.W.3d 810, 812 (Tex.

App.—Dallas 2000, pet. denied)). As we held in *Bradt v. West*, 892 S.W.2d 56 (Tex. App.—Houston [1st Dist.] 1996, writ denied)

> The public has an interest in "loyal, faithful and aggressive representation by the legal profession . . . ." An attorney is thus charged with the duty of zealously representing his clients within the bounds of the law. In fulfilling this duty, an attorney "ha[s] the right to interpose any defense or supposed defense and make use of any right in behalf of such client or clients as [the attorney] deem[s] proper and necessary, without making himself subject to liability in damages . . . ." Any other rule would act as a severe and crippling deterrent to the ends of justice for the reason that a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights to which he is entitled.

*Id.* at 71 (internal citations omitted) (alteration in original).

The focus when attorney immunity is asserted "is on the *kind* of conduct rather than the *alleged wrongfulness* of said conduct." *Youngkin v. Hines*, 546 S.W.3d 675, 681 (Tex. 2018) (emphasis in original). Conduct that is "part of the discharge of the lawyer's duties in representing his or her client" is not actionable, even if the conduct is "wrongful in the context of the underlying suit." *Cantey Hanger*, 467 S.W.3d at 481[10] (quoting *Toles v. Toles*, 113 S.W.3d 899, 910–11 (Tex. App.—Dallas 2003, no pet.)). Attorneys cannot be liable to third parties "for conduct that requires the office, professional training, skill, and authority of an

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[10] While defamation claims cannot be used to punish attorneys for what opponents contend is wrongful conduct, mechanisms such as sanctions, contempt, and attorney disciplinary proceedings "are in place to discourage and remedy such conduct." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015).

attorney." *Id.* at 482 (quoting *Dixon Fin. Servs., Ltd. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 WL 746548, at *7 (Tex. App.—Houston [1st Dist.] Mar. 20, 2008, pet. denied) (mem. op. on reh'g)). Attorney immunity

> protects the attorney from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity. . . . The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary to the proceeding. The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion.

RESTATEMENT (SECOND) OF TORTS § 586 cmt. a (Am. Law Inst. 1977).[11] Judicial proceedings "include all proceedings before an officer or other tribunal exercising a judicial function," including arbitration. *Id.* § 586 cmt. d. Attorney immunity, however, does not protect lawyers whose "acts are entirely foreign to the duties of an attorney" or whose acts do not "involve the provision of legal services and

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[11] Section 586 of the Restatement (Second) of Torts states:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

RESTATEMENT (SECOND) OF TORTS § 586. Section 587 of the Restatement affords parties the same protection available to attorneys in section 586. *Id.* § 587 cmt. d.

would thus fall outside the scope of client representation." *Cantey Hanger*, 467 S.W.3d at 482.

As the Texas Supreme Court held earlier this year, attorney immunity

> protects an attorney against a non-client's claim when the claim is based on conduct that (1) constitutes the provision of "legal" services involving the unique office, professional skill, training, and authority of an attorney *and* (2) the attorney engages in to fulfill the attorney's duties in representing the client within an adversarial context in which the client and the non-client do not share the same interests and therefore the non-client's reliance on the attorney's conduct is not justifiable.

*Haynes & Boone, LLP v. NFTD, LLC*, No. 20-0066, —— S.W.3d ——, ——, 2021 WL 2021453, *10 (Tex. May 21, 2021) (emphasis in original). Thus, the threshold issue in a Rule 91a motion to dismiss based on attorney immunity is "whether the plaintiff's allegations, if taken as true, concern actions taken in connection with the attorney's representation of her client" involving the "unique office, professional skill, training, and authority of an attorney." *Id.*; *McDill*, 2020 WL 4726634 at *8. The challenged communication "must bear some relation to a judicial proceeding in which the attorney is employed, and must be in furtherance of that representation." *Russell v. Clark*, 620 S.W.2d 865, 868 (Tex. Civ. App.—Dallas 1981, writ ref's n.r.e.) (holding "all doubt should be resolved in favor of its relevancy"); *see also Odeneal v. Wofford*, 668 S.W.2d 819, 820 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

## Defamation

The gravamen of BCA's defamation complaint against the Kassabs is the allegation that BCA received $8,800 in filing fees from twenty-two clients but paid only $800 in filing fees, keeping the remaining $8,000 "in illegal and unethical fees that they received," as well as the accompanying footnote in the First Amended Petition suggesting BCA "pocketed" hundreds of thousands of dollars elicited similarly from other clients in the BP litigation.

The Kassabs argue the attorney immunity doctrine precludes BCA's defamation claim against them because the conduct of which BCA complains took place during their representation of Canfora. The Kassabs assert the only issue in dispute is whether the actions were "taken in connection with representing a client in litigation." BCA argues the statements at issue have no relation to the proceeding, precluding the application of the attorney immunity doctrine. BCA argues the statements "do not" have "some relation to the proceeding," but were instead filed "simply to obtain media interest and hit the press with high levels of coverage from several media outlets."[12]

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[12] BCA's claims are not based on any statements made to the press. Instead, BCA's defamation claims stem only from allegations in the First Amended Petition.

The protection afforded attorneys by the attorney immunity privilege is broad.[13] Here, attorney immunity shields the Kassabs' statements made in the First Amended Petition, because the statements were made within the scope of their representation of Canfora and MCI and do not constitute conduct foreign to the duties of a lawyer. *See Youngkin*, 564 S.W.3d at 682 (concluding attorney's conduct "was directly within the scope of his representation of his clients, regardless of any disagreement over the substance" of work and, thus, protected by attorney immunity doctrine).[14] Their conduct involved the provision of legal services involving the "unique office, professional skill, training, and authority of an attorney" to "fulfill their duties in representing [Canfora and MCI] within an adversarial context." *Haynes & Boone, LLP*, 2021 WL 2021453 at *10.[15]

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13 However, courts have identified modes of attorney conduct that are not protected by the privilege. For example, attorney immunity shields the attorney who knowingly participates in fraudulent activities on his client's behalf, but not the attorney's participation in independently fraudulent activities, which is "foreign to the duties of an attorney." *Haynes & Boone, LLP v. NFTD, LLC*, No. 20-0066, —— S.W.3d ——, ——, 2021 WL 2021453, *8 (Tex. May 21, 2021) (citing *Cantey Hanger*, 467 S.W3d at 483).

14 In *Youngkin*, the supreme court held the attorney immunity defense precluded a non-client's claim that asserted his opponent's attorney entered into a settlement agreement with the knowledge that his clients did not intend to comply with the agreement and subsequently prepared fraudulent deeds to deprive the non-client of his property. *Youngkin v. Hines*, 546 S.W.3d 675, 678–79 (Tex. 2018).

15 Even an "unwarranted inference from the evidence" is protected by the attorney privilege. RESTATEMENT (SECOND) OF TORTS § 586 cmt. c.

We also cannot say that the statements have "no connection whatever with the litigation," as BCA contends. The statements bear "some relation" to the proceeding because Canfora and MCI specifically allege that BCA breached its fiduciary duties to MCI and Canfora by requesting payment of additional filing fees, which according to MCI and Canfora, BCA "pocketed" or used improperly. Whether these statements are true or made with ill intent is irrelevant. *Landry's, Inc. v. Animal Legal Def. Fund*, No. 19-0036, ––– S.W.3d ––––, ––––, 2021 WL 2021130, *3 (Tex. May 21, 2021) (explaining wrongful conduct by attorney "is not actionable if it is part of the discharge of the lawyer's duties in representing his or her client").

BCA appears to concede this point. In their response to Canfora's and the Kassabs' Rule 91 Motion, BCA recognizes that "[a]rguably, the allegation that BCA 'pocketed' $400 filing fees paid by the five Plaintiffs in this matter could be considered to be 'in connection' with their representation—even if the statement is demonstrably false." They argue, however, that the other statements in the First Amended Petition about the alleged payment of similar fees by non-parties to the litigation are not barred because they relate to strangers—non-clients of the Kassabs. But even allegations against third parties may be subject to the attorney privilege when they bear some relationship to the proceedings.

*Odeneal v. Wofford*, on which BCA relies, illustrates this point. The Odeneals, husband and wife, sued attorney Wofford for defamation based on statements he made about them in his response to a grievance Ms. Odeneal filed with the State Bar Grievance Committee complaining of Wofford's conduct in a separate lawsuit she filed against Wofford's client.[16] 668 S.W.2d at 819–20. The trial court granted summary judgment in favor of Wofford, holding that his statements were entitled to absolute privilege. *Id.* at 820. On appeal, the court rejected Mr. Odeneal's argument that absolute privilege did not apply to Wofford's statements about him, because Mr. Odeneal was not a party to the litigation giving rise to the grievance and Wofford's statements to the State Board Grievance Committee were unrelated to the grievance. *Id.* The court held that "even statements aimed at non-parties are absolutely privileged if they bear some relation to the proceedings." *Id.*

Here, the statements about the payment of additional filing fees by Canfora and others "bear[] some" relationship to Canfora's underlying claim that BCA breached its fiduciary duties by collecting such fees and allegedly "pocketing" them. Thus, while we agree with BCA that attorney immunity is not without limit, we hold that in this case, the Kassabs are entitled to absolute immunity. *See id.* (noting "the court must consider the entire communication in its context, and must

[16] Lou Odeneal was represented in the suit by her husband, William Odeneal.

extend the privilege to any statement that bears some relation to an existing or proposed judicial proceeding," explaining that "[a]ll doubt should be resolved in favor of its relevancy").

## Tortious Interference with Contract

BCA alleges the Kassabs tortiously interfered with BCA's contract with Canfora by filing suit against BCA because BCA and Canfora entered into a settlement agreement that "incorporated all the claims alleged by Canfora and the Canfora entities in this proceeding." BCA asserts the Kassabs' very representation of Canfora and MCI subjects it to tort liability, a concept for which BCA cites no support. BCA states only that the Kassabs should have made inquiries into the history of BCA's representation of Canfora, which would have exposed the settlement agreement and release. They further argue that

> The Kassab defendants' choice to represent Canfora is knowingly in direct breach of the contract between Canfora and the BCA Defendants. This choice was not a statement made in connection with litigation or arising out of the course of a judicial proceeding. This was a calculated decision to interfere with any already existing contract between Canfora and the Defendants . . . .

This Court has explained that "an attorney's conduct, even if frivolous or without merit, is not independently actionable if the conduct is part of the discharge of the lawyer's duties in representing his or her client." *Alpert*, 178 S.W.3d at 406. Given that application of the attorney immunity defense depends on the "type of conduct, not on whether the conduct was meritorious in the context

of the underlying lawsuit," BCA's argument lacks merit. *See id.*; *see also Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.)[17] (holding that "acquiring documents from a client that are the subject of litigation against the client, reviewing the documents, copying the documents, retaining custody of the documents, analyzing the documents, making demands on the client's behalf, advising a client to reject counter-demands, speaking about an opposing party in a negative light, advising a client on a course of action, and even threatening particular consequences such as disclosure of confidential information if demands are not met" could be considered "part of the discharge of an attorney's duties in representing a party in hard-fought litigation"); *U.S. Bank Nat'l Ass'n v. Sheena*, 479 S.W.3d 475, 480 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding attorney immunity barred claim that attorney tortiously interfered with contract by depositing and disbursing settlement funds without considering third party's alleged interest in funds).

Accepting BCA's factual allegations as true, the Kassabs' conduct "involves acts or omissions undertaken as part of the discharge of the attorney's duties as

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[17] In *Highland Capital*, the Dallas Court of Appeals held the trial court properly granted a rule 91a motion to dismiss on a tortious interference claim, among others, based on attorney immunity. *Highland Capital Mgmt., LP v. Looper Reed & McGraw, P.C.*, No. 05-15-00055-CV, 2016 WL 164528, at *6 (Tex. App.—Dallas Jan. 14, 2016, pet. denied) (mem. op.).

counsel to an opposing party." *Highland Capital*, 2016 WL 164528 at *6 (quoting *Guzder v. Haynes & Boone, LLP*, No. 01-13-00985-CV, 2015 WL 3423731, *8 (Tex. App.—Houston [1st Dist.] May 28, 2015, no pet.) (mem. op.)). Thus, BCA's tortious interference claim against the Kassabs is barred by the doctrine of attorney immunity, and Respondent abused her discretion in denying the Rule 91a motion on that claim.

**Judicial Proceeding Privilege: Claim against Canfora**

Canfora asserts the defamation claim against him is barred by the judicial proceedings privilege because it is undisputed the statements at issue were made in a judicial proceeding, and "any statement made in the trial of any case, by anyone, cannot constitute the basis for a defamation action, or any other action." *Wilkinson v. USAA Fed. Sav. Bank Tr. Servs.*, No. 14-13-00111-CV, 2014 WL 3002400, at *6 (Tex. App.—Houston [14th Dist.] July 1, 2014, pet. denied). BCA argues Canfora is not entitled to the privilege because the statements in the First Amended Petition about the alleged theft of filing fees from the plaintiffs were "separate and apart from and not in any way related to the allegations of legal malpractice against BCA" and "have been proven both incorrect and unrelated to the proceedings." BCA further contends that "the allegation [in the footnote] of theft of hundreds of thousands of dollars in filing fees is not related to this proceeding and is not protected by the Judicial Privilege."

Although there is some overlap, the judicial proceeding privilege is independent of the attorney immunity doctrine. The judicial proceedings privilege provides that communications made by counsel, parties, witnesses, the judge, or the jurors "in the due course of a judicial proceeding" cannot serve as the basis of a defamation action, "regardless of the negligence or malice with which they are made." *Landry's, Inc.*, 2021 WL 2021130 at *2 (citing *James v. Brown*, 637 S.W.2d 914, 916 (Tex. 1982)); *see also Deuell v. Tex. Right to Life Comm., Inc.*, 508 S.W.3d 679, 689 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) ("The judicial privilege applies to bar claims that are based on communications related to a judicial proceeding that seek defamation-type damages in name or in substance, i.e., damages for reputational harm."). It is an absolute privilege that "attaches to all aspects of the proceedings, including statements made in . . . any of the pleadings or other papers in the case." *Landry's*, 2021 WL 2021130 at *3.

For the privilege to be triggered, "there must be a relationship between the correspondence and the proposed or existing judicial proceeding, which decision is made by considering the entire communication in context, resolving all doubts in favor of its relevancy," and the damages sought must be defamation-type damages. *Waller v. Waller*, No. 12-19-00226-CV, 2020 WL 3026342, at *9 (Tex. App.—Tyler June 5, 2020, no pet.) (mem. op.); *Deuell*, 508 S.W.3d at 690; *see also Gawlikowski v. Sikes*, No. 01-11-00504-CV, 2012 WL 2159918, at *3 (Tex.

App.—Houston [1st Dist.] June 14, 2012, no pet.) (mem. op.) ("To be privileged, the communication must bear some relationship to pending or proposed litigation and must further the attorney's representation."); RESTATEMENT (SECOND) OF TORTS § 587 ("A party to a private litigation . . . is absolutely privileged to publish defamatory matter concerning another in communications . . . during the course and as part of, a judicial proceeding in which he participates, if the matter has some relation to the proceeding."). The defamatory statement need not be "relevant or material to any issue before the court. It is enough that it have some reference to the subject of the inquiry." RESTATEMENT (SECOND) OF TORTS § 587 cmt. c.

A party is not liable "for defamatory matter volunteered or included by way of surplusage in his pleadings if it has any bearing upon the subject matter of the litigation." *Id.* "The [judicial proceeding] immunity is absolute even though the statement is false and uttered or published with express malice." *Hill v. Herald-Post Pub. Co., Inc.*, 877 S.W.2d 774, 782 (Tex. App.—El Paso 1994), *aff'd in part, rev'd in part on other grounds*, 891 S.W.2d 638 (Tex. 1994) (citing *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 912 (1942)).

Considering the entire communication in context and resolving all doubts in favor of the statement's relevancy, we conclude the statements giving rise to the defamation claim against Canfora bear some relationship to the litigation and

Canfora's claim that BCA breached its fiduciary duties. The judicial proceeding privilege thus precludes BCA's defamation claim.

### No adequate remedy by appeal

The Supreme Court has held there is no adequate remedy by appeal if a Rule 91a motion is improperly denied. *In re Houston Specialty Ins. Co.*, 569 S.W.3d 138, 141–42 (Tex. 2019); *see also In re Essex*, 450 S.W.3d at 526 (denial of Rule 91a motion to dismiss is subject to mandamus review); *In re Tunad Enters., Inc.*, No. 05-18-01157-CV, 2018 WL 4959418, at *1 (Tex. App.—Dallas Oct. 15, 2018, orig. proceeding) (same).

### Conclusion

We conditionally grant Relators' petition for mandamus relief. Our writ of mandamus will issue only if Respondent does not comply with this opinion. All pending motions are dismissed as moot.

**PER CURIAM**

Panel consists of Chief Justice Radack and Justices Rivas-Molloy and Guerra.